Social Welfare Department refused to provide the number of "places of agency quota" of a residential care home for the elderly
(Related to Code on Access to Information)

Investigation Report

On 21 February 2020, the complainant lodged a complaint with this Office against the Social Welfare Department ("SWD").

The Complaint

2. The complainant claimed that on 23 November 2019, pursuant to the Code on Access to Information ("the Code"), he requested SWD to provide information on the number of "places of agency quota" ("AQ places") of a named residential care home for the elderly ("RCHE") ("Home A") in each financial year between 12 October 2009 and 23 November 2019 ("the Requested Information"). On 6 December 2019 (should actually be 4 December, see **para. 11**), SWD replied to him in writing with a refusal to release the Requested Information, citing paragraph 2.14 (a) of the Code (see **para. 5**) as the reason.

3. The complainant considered SWD's decision of non-disclosure unreasonable and raised the following reasons to justify disclosure:

(1) The AQ places in Home A were fully subvented by the Government and, therefore, disclosure of the Requested Information would be in the public interest.

(2) Given the AQ places in question were subject to SWD's regulation, the Requested Information was not third-party information. SWD should know the number of AQ places in Home A and have the authority to disclose the Requested Information to a third party and the public.

(3) All RCHEs (including Home A) were required under the licence to publish the number of places they provided.

Our Findings

4. We launched a full investigation into the case on 18 March 2020, and received information from SWD on 11 June and 20 July. On 28 July, we issued a draft investigation report to SWD. On 11 August, SWD sent us its comments on the draft report. Having examined the information and explanation provided by SWD, we completed the investigation on 18 August 2020. Our findings follow.

The Code and Relevant Parts of its Guidelines on Interpretation and Application

5. The Code provides that all Government departments should try their best to disclose the information they hold so that the community would be well informed about the Government and the services it provides, unless the information may be refused under Part 2 of the Code. Such information includes:

> Paragraph 2.14 (a): Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed. However, such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.

6. Furthermore, paragraph 2.14.3 of the Guidelines on Interpretation and Application of the Code ("the Guidelines") points out that "care must always be taken in cases which involve third party information. Information is given to the Government in many different circumstances by persons, corporations and organisations on the explicit or implicit basis that such information, including its source, will be kept confidential…."

SWD's Response

<u>Establishment and Historical Background of AQ Places</u>

7. SWD provides subsidies to non-governmental organisations for operating subvented RCHEs. Elderly persons who wish to be admitted to a subvented RCHE must first go through the "Minimum Data Set - Home Care assessment" ("MDS - HC assessment") before being allocated a place through SWD's Central Waiting List ("CWL"). Those places in subvented RCHEs allocated by SWD are called "SWD quota places" ("SWD places"), while those reserved by individual subvented RCHEs for allocation to elderly applicants are called "AQ places". Both SWD places and AQ places are subvented by the Government.

8. SWD explained that for subvented RCHEs planned and built before 1995, the arrangements with respect to AQ places were either prescribed in the Private Treaty Grant ("PTG") leases, or agreed between SWD and the respective organisations/groups/donors owing to their donation or contribution for the construction costs or the facilities procurement costs of the RCHEs. Generally speaking, AQ places would not exceed 20% of the total number of places in an RCHE. Against this historical background, allocation of the AQ places in these subvented RCHEs is determined by the RCHEs themselves rather than SWD via the CWL. Subvented RCHEs planned and built after 1995 were no longer granted AQ places by SWD.

9. Since 2007, SWD has stepped up the management for AQ places by requiring all elderly persons allocated an AQ place to undergo the MDS - HC assessment (see **para. 7**) to confirm their need for an RCHE place. Furthermore, agencies must draw up their own manual regarding management of their AQ places and submit relevant information to SWD every year to ensure that the allocation arrangements for AQ places comply with the requirements of their manual. Agencies must also publish information concerning their waiting list arrangement for AQ places, as well as the assessment and admission procedures for elderly persons.

10. For optimal use of resources, SWD indicated that vacant AQ places in RCHEs would be seconded for CWL allocation. As at late 2019, of the 16,825 subvented places in a total of 126 subvented RCHEs and nursing homes in the territory, 1,654 were AQ places (involving 73 subvented RCHEs, including Home A). Among these, 327 were seconded places. In other words, the remaining 1,327 AQ places were for allocation by the subvented RCHEs concerned.

The Complainant's Case

11. With respect to the complainant's request for information on 23 November 2019, SWD wrote to him on 4 December stating that information on the number of AQ places Home A provided to the Department should not be disclosed without Home A's consent. SWD, therefore, invoked paragraph 2.14 (a) of the Code (see **para. 5**) to refuse disclosure to the complainant the Requested Information.

About Paragraphs 3(1) and 3(2)

12. SWD pointed out that AQ places are subvented by the Government. Under the Lump Sum Grant Subvention System, subvented organisations are subject to SWD's monitoring and must observe the various requirements of the Funding and Service Agreement and the Lump Sum Grant Manual. Regarding SWD's monitoring of their financial management, subvented organisations must submit to the Department their annual financial reports and audit reports by external auditors with respect to their subvented services, as well as their audited annual financial statements of the organisation as a whole. SWD would scrutinise the documents submitted in order to monitor how the government grant has been used. In addition, SWD would conduct direct accounting audits on the subvented organisations to examine their financial management and internal control procedures for using government subvention to ensure proper use of government resources.

13. Since 2015, the complainant had repeatedly enquired the various relevant service units of SWD about information of Home A.

Between 2016 and 2019, SWD staff of the relevant units consulted Home A via telephone or email, and was informed by it that the information requested by the complainant involved the information it owned and provided to SWD only for the purpose of monitoring its services. As such, Home A objected to the disclosure of the information.

14. In handling the complainant's request for the Requested Information, SWD held that the number of AQ places was information Home A provided to it. Before replying to the complainant, SWD had considered the fact that there were already measures under the existing mechanism to monitor how non-governmental organisations make use of the subvention for AQ places (see **paras. 9 and 12**), as well as Home A's objection to disclosing other information requested by the complainant in the past (see **para. 13**). In this light, SWD cited paragraph 2.14 (a) of the Code (see **para. 5**) to refuse disclosure of the Requested Information.

About Paragraph 3(3)

15. SWD clarified that currently, there is no requirement for RCHE operators to publish in their licences the number of different categories of places in their RCHEs[Note]. Nevertheless, SWD does publish and provide updates on its website the number of places in various subvented RCHEs, including the total number of SWD places and AQ places. According to the information published by SWD, as at March 2020, there were altogether 175 places in Home A.

Latest Development

16. Upon commencement of our investigation, SWD reviewed the complainant's case and consulted Home A. Initially, Home A insisted that the Requested Information involved the information it owned, which was only provided to SWD for monitoring purposes.

[Note] [Note] Refer to the SWD website: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_residentia/id_listofresi/

As such, it objected to disclosing the Requested Information. Upon obtaining legal advice subsequently, SWD considered that since AQ places were subvented by the Government, disclosing the number of such places for ensuring the proper use of resources assigned to RCHE services was actually in line with the public interest. SWD then consulted again Home A concerning the Requested Information. The latter then agreed to SWD's disclosure of information.

17. On 16 July 2020, SWD provided the Requested Information to the complainant.

Our Comments

18. Information provided by SWD (see **para. 8**) revealed that with regard to subvented RCHEs planned and built before 1995 (including Home A), because of historical factors, SWD had agreed with the organisations/groups/donors concerned on the allocation of AQ places. The number of AQ places, though prescribed by the Government in the respective PTG lease, involved the information of a third party i.e. the subvented RCHE concerned.

19. Paragraph 2.14.3 of the Guidelines states that Government departments must be careful in handling third party information. This Office opines that in deciding disclosure or otherwise of the Requested Information to the complainant, SWD should consider whether there had been "an explicit or implicit understanding (from the third party) that it would not be further disclosed", and whether "the public interest in disclosure (would) outweigh any harm or prejudice that would result". Nevertheless, this Office has reservations about SWD's view that the number of AQ places for allocation in Home A, which were subvented by public funds and subject to SWD's monitoring, was "third party information".

20. Furthermore, our investigation found that SWD's refusal of the complainant's request was based solely on Home A's previous objection to disclosing other information to the complainant (see **para. 13**) and it did not seek Home A's opinion concerning the

complainant's request this time. It was not until our intervention that SWD consulted Home A and was told at the second time that it agreed to disclose the Requested Information (see **para. 16**). It showed that before consulting Home A, SWD just considered Home A's previous stance and conjectured that Home A would object to disclosing the Requested Information. SWD had never explicitly or implicitly learned from the third party (i.e. Home A) that the Requested Information was not to be disclosed. SWD's decision-making process was improper.

21. Furthermore, as expounded in **paragraph 5**, even if Home A did not agree to disclose the number of its AQ places, SWD should have weighed the public interest in disclosure against the harm or prejudice that disclosure might result. Since AQ places are services subvented by public funds, the organisations concerned have to publish information concerning the waiting list arrangement, as well as the assessment and admission procedures for such places in their RCHEs. This Office is of the view that information about AQ places should be as open and transparent as that about SWD places to facilitate monitoring by the public and understanding by elderly persons on the waiting list. This is in fact in line with the public interest. If SWD could publish the total number of places in subvented RCHEs (see **para. 15**), we see no overriding reasons not to do the same for AQ places. Actually, disclosure of such information would in no way harm or prejudice subvented RCHEs.

22. In light of our comments set out in **paragraphs 18 to 21**, The Ombudsman considers that SWD's initial refusal to provide the Requested Information to the complainant was not in line with the Code. This complaint is, therefore, **substantiated**.

Recommendation

23. The Ombudsman recommends that SWD strengthen staff training to ensure its staff's strict adherence to the Code and the Guidelines in handling public requests for information.

Office of The Ombudsman
August 2020